

October 7, 2003

PUBLIC UTILITIES COMMISSION  
Amendment to Underground Facility  
Damage Prevention Requirements  
(Chapter 895) Pursuant to P.L. 2003,  
Chapter 373

NOTICE OF RULEMAKING

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

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**I. SUMMARY**

In this rulemaking, we propose to amend Chapter 895, the Underground Facility Damage Prevention Requirements Rule, to complete the directive in P.L. 2003, ch. 373 to establish notice requirements for excavation associated with well water construction in order to expedite the drilling of private drinking water wells. This is a major substantive rulemaking. The Commission will provisionally adopt amendments to Chapter 895 related to notice requirements for excavation associated with well water construction, which are then subject to review and adoption by the Legislature. 5 M.R.S.A. § 8071.<sup>1</sup>

The proposed amendments in this rulemaking would require member operators to provide the Dig Safe system with facility location mapping that achieves the highest degree of accuracy that the Dig Safe system is capable of utilizing, in order to eliminate delay to well constructors, as well as other excavators, when there are no facilities in the excavation area, as envisioned in P.L. 2003, ch. 373, section 2. This change will increase the effectiveness of the new law and will also significantly reduce false notifications and associated needless location expense to operators.

In addition, we invite comment on the merits of our proposal to provide a single reference by web page that indicates which non-member operators provide service in a particular excavation area to further assist well constructors and excavators in making the initial notifications of proposed excavation.

**II. BACKGROUND**

The law protecting underground facilities requires that a damage prevention system exist in Maine to ensure that adequate safety precautions protect the public

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<sup>1</sup> Excerpts of the Rule are attached showing the location and text of our proposed amendments in this rulemaking. A copy of the entire rule will be provided with our Notice of Rulemaking in Docket No. 2003-672 with additional draft proposed amendments that are unrelated to this directive.

when excavation occurs near an underground facility. 23 M.R.S.A. § 3360-A. The statute establishes procedures that must be followed by excavators and underground facility operators when excavation occurs. The Dig Safe System, Inc. (the Dig Safe System), an independently owned corporation that operates the New England regional damage prevention system, currently carries out the underground safety system directed by law.

During the first session of the 121<sup>st</sup> Legislature, Maine's Legislature enacted P.L. 2003, ch. 373 (the 2003 Act), consisting of two parts. First, the 2003 Act amended 23 M.R.S.A. Section 3360-A to eliminate the Dig Safe law's 3-day waiting period requirement in instances where there are no underground facilities in the excavation area. This means that an excavator may dig immediately after calling Dig Safe and all non-member operators that may have underground facilities in the area if the excavator is told that there are, in fact, no underground facilities within the excavation area.

Next, the law directs the Commission to establish, by major substantive rulemaking, notice requirements for excavation associated with drinking water well construction.<sup>2</sup> The law also directs the Commission to consider the following in its rulemaking:

- A. Whether notice requirements established in the rule should be limited to the drilling of a well or should also apply to other excavation associated with well construction activities, such as trenching for installation of pipes and equipment;
- B. Whether notice requirements established in the rule should be based on factors such as geographic location, population density or other criteria bearing on the efficiency and effectiveness of the notification process and any offsetting public safety risks;
- C. Whether the amount of time required for notice prior to excavation should be reduced; and
- D. Whether any other notice requirements associated with drinking water well construction are appropriate.

On July 17 and 23, 2003, the Commission held meetings in Augusta with well constructors, other excavators, operators, and the Dig Safe System to seek input about possible rule changes to address the water well construction issues, as well as other

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<sup>2</sup>An Act to Expedite the Drilling of Private Drinking Water Wells, P.L.2003 , ch. 373, effective September 13, 2003.

possible changes to the rule.<sup>3</sup> This proposed rule reflects the comments and suggestions that were made during those meetings.

### III. DISCUSSION OF LEGISLATIVE ISSUES AND PROPOSED AMENDMENTS

We address the issues delineated by the Legislature as restated below.

#### **1. Should notice requirements be limited to the drilling of a well or also apply to other excavation associated with well construction activities?**

Participants at the legislative hearing on the 2003 Act, as well as at our pre-rulemaking excavators' meeting, discussed the nature of the water well construction business. Some of its features distinguish it from other types of excavation; some of its features do not. For example, water well drilling is often a relatively short procedure, leaving the drillers time to work on more than one job site in a day. In contrast, many construction projects require several days, weeks, or months to complete and, except in cases where the contractor is managing multiple excavation projects, may not require notification to the Dig Safe System with the same frequency as does well drilling which may involve as many as two or three wells per day.

Well drillers noted that moving the drilling rig from location to location is time consuming and time spent traveling from job to job or to pre-mark one job and return to the next threatens already tight profit margins. However, these features do not necessarily distinguish water well drillers from all other types of excavation businesses, such as sign and fence installers.

Well drilling is often in great demand during times of drought and, in such times, neighbors and passers-by often approach working well drillers in an impromptu manner requesting their services on nearby lots. This too is not very different from the common, relatively spontaneous requests made of certain other small job contractors and excavators, such as driveway pavers, stump grinders, or fence installers.

Three New England states' damage prevention laws (Vermont, New Hampshire, and Rhode Island) exempt from their notification requirements excavation sites located over 100 feet from any underground facility. We do not support this exemption because it relies heavily on the excavator's imperfect knowledge, or more often, deduction of the existence and approximate location of underground facilities near the proposed excavation area. We are concerned that reliance on such methods could result in significantly higher numbers of damage incidents. It is too early to evaluate its effect on the frequency of damage incidents in Vermont and New

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<sup>3</sup> The Commission notified over 400 stakeholders of these meetings by mail and invited broad participation.

Hampshire which both only implemented this exemption in January 2003.<sup>4</sup> However, we invite comment on this possible modification of the damage prevention law.

We have found no state in the New England region that gives an exemption to water well drillers as a select group. While we are mindful of the drillers' financial concerns, foregoing underground facilities damage prevention safety precautions would ignore the public safety purposes of the law. Many types of businesses share the concerns expressed by the water well constructors. We see no reason to adopt disparate treatment of similarly situated excavators and find no compelling reason to support a finding that water well constructors should be exempted from the Dig Safe law's requirements on a wholesale basis. We invite comment on this preliminary conclusion.

**2. Should notice requirements established in the rule be based on factors such as geographic location, population density, or other criteria bearing on the efficiency and effectiveness of the notification process and any offsetting public safety risks?**

a. Geographic or population density

There were several proponents among the water well constructors of a geographic exemption from the requirements of the Dig Safe law. They argued for exemption from the entire Dig Safe law in northern Maine given their expectation that far fewer underground facilities are located in remote areas of the state such as are typical of much of northern Maine.

Others noted that it is not the case that all areas in more rural regions of the state have no underground facilities or that there will be no facilities in particular areas where water well constructors wish to dig. These entities argued against an exemption for less populated areas or for specified reasons because the safety and damage prevention purposes of the law are as applicable there as anywhere in the state.

The Commission's statistics reveal that damage incidents have occurred in widespread areas of the state, including less population-dense areas such as Aroostook and Washington Counties, and that some of these incidents involved water well constructors. Further, as noted by both the U.S. Department of Transportation Pipeline Safety Inspector for the Eastern Region and well driller commenters, hazardous substance pipelines, which carry some of the largest public safety risks from potential regional interruptions of service, and which pose a personal injury and environmental hazard, cross many remote areas of Maine. These high-risk pathways,

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<sup>4</sup> We do not consider Rhode Island's damage statistics reliable indicators of what Maine would experience due to key differences in the structure of their damage prevention laws.

some of which may be long established and poorly marked, militate against complete exemption from Dig Safe requirements in low population density areas.

Having a geographically divided area or a population density threshold would require excavators to determine whether or not their proposed excavation site falls within the exempted territory or not. Given that new development occurs continually, that development is often interspersed with undeveloped lots, and that whole towns are unlikely to have a uniform degree of underground facility installation, a reasonably safe, long-standing boundary between smaller and higher risk areas could not be easily determined and might frequently put the driller at risk. An arbitrary firm boundary would not be consistent with safety and damage prevention goals.

In the event a boundary were based on changing factors such as population density or degree of development, excavators would need to access updated information on the pertinent factor each time they proposed to dig to determine whether they are inside or outside of the exemption area. The need to make this determination would add uncertainty and confusion not present under the current law, which requires that all excavations by mechanical means must comply with Dig Safe notice requirements. Furthermore, the recently revised law, which allows an excavator to dig immediately after calling Dig Safe and non-member operators if there are no underground facilities in the excavation area, provides the necessary safety risk screening without need of further inquiry or discretion on the excavator's part or the risk to facilities that a discretionary system would introduce.

Because of these difficulties, we do not propose a geographic or population density based exemption. We invite comment on this preliminary conclusion.

b. Efficiency and effectiveness of the notification process

At the legislative hearing, members of the water well construction industry expressed particular concern with the following situations:

i. A facilities locator cannot find the proposed excavation site in remote areas and abandons the effort commenting that "there's nothing there anyway," and costing the excavator unnecessary delay; and

ii. Excavators are required to wait three days for utilities to mark "No Facilities" when there are no underground facilities in or near the excavation site.

The Legislature addressed these concerns with the passage of P.L. 2003, ch. 373 §2, which eliminates the Dig Safe law's 3-day waiting period requirement in instances in which the excavator confirms through the normal Dig Safe notification procedure that there are no underground facilities in the excavation area. In this circumstance, an excavator may dig immediately after calling the Dig Safe System and all non-member operators that may have underground facilities in the area. A coalition of stakeholders supported passage of this law, including major utilities, Associated

Contractors of Maine and the Maine Ground Water Association. We propose to insert this provision of law into Chapter 895 as Section 4(B)(1)(a)(i). We invite comment on this placement.

This provision should significantly address the concerns expressed to the Legislative committee in May 2003 by relieving excavators with projects in areas where there are no underground facilities from unnecessary delay. According to the Dig Safe System's records, there are 240 municipalities in Maine that have no member facilities.

However, the effectiveness of this provision relies on the accuracy of the information held by the Dig Safe System's response center. When notified of a proposed excavation, the Dig Safe System response center staff confirms whether or not member operators have underground facilities in the excavation area by referring to the location information provided to it by the owners of those facilities.<sup>5</sup> The Dig Safe System currently is capable of providing information to excavators over the phone with a level of accuracy to the street on which the excavation site is proposed. Several utilities, however, have taken a more broad brush approach, indicating to the Dig Safe System that they are to be notified of any excavation proposed in any municipality in which the utility has facilities, irrespective of whether those facilities are underground. This fact greatly increases the instances in which an excavator will be incorrectly informed that there are underground facilities in the excavation area and will be forced to wait three days unnecessarily. In addition, this broad brush approach causes the utilities to needlessly expend resources in sending a locator to areas in which there are known to be no underground facilities. To the extent that a site visit can be avoided without compromising safety, efficiency is increased.

We propose to add a provision to the rule as section 6(A)(1)(d) to require Dig Safe System members to supply information on the location of their facilities in a format acceptable to the Dig Safe System that achieves the highest degree of detail that the Dig Safe System can utilize. There are several ways an operator can comply with this requirement. Those who have their facilities electronically mapped may provide that information in electronic or digital format. Others may wish to supply Geological Positioning System (GPS) coordinates. A third option, which we anticipate will be feasible for all operators that do not have more sophisticated mapping systems, is to draw the specific physical location of all underground facilities on maps provided by the Dig Safe System. The Dig Safe System will then scan and digitize the drawn images and enter this data into its computer, which then can identify underground facilities locations within a 133 foot radius of a proposed excavation site.

We intend that this provision be worded flexibly enough to allow for improvements and changes in the technology employed by the Dig Safe System and underground facility operators, without need of a rulemaking to incorporate each change

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<sup>5</sup> Non-member operators advise the excavator directly based on their records. We focus on the member operators because we have not had reports that non-member operators cause similar delay to excavators.

explicitly into the language of our rule. We anticipate that the Dig Safe System will adequately communicate such changes to its membership as they develop.

We invite comment both on the requirement that operators provide the Dig Safe System with maps of underground facility locations in these formats and to the degree of accuracy we have specified, as well as on the wording of the provision as it appears in legislative format in the attached rule.

Finally, to make the process for excavation notifications more efficient, we anticipate that it would be useful for excavators to have an easily accessible resource containing the names and contact information for all non-member operators that may have facilities located in the proposed excavation area. This is not currently a service provided by the Dig Safe System, which only collects and provides information pertaining to its members, however, the Dig Safe System is a logical choice for this service because an excavator working in a remote area might need to only make one call to ascertain that no underground facilities exist in the proposed excavation area if no non-members are on record for that location. Contractor Associations might also consider providing such a service for the benefit of their members. It seems likely that having such a reference tool would enable the excavator to quickly determine those entities that it must notify of the proposed excavation and, upon making contact, to determine whether there are underground facilities in the excavation area.

At present, the Commission provides a partial list of non-member operators showing the municipalities in which they are authorized to provide service. Staff developed this list through inquiries to non-member operators of which it was aware, but it may not be a complete list of non-member operators. Several options exist. We could continue to maintain the list as it is now designed, with periodic updating based on non-member information. Another possibility would be for the Commission to develop a mapping system that would allow excavators to click on the municipality in which they propose to excavate to see the list of non-member operators who may have facilities in that town or city.

We invite comment on the benefits of having a directory of non-member operators by municipality for excavator reference and on what form such a reference should take to make it most useful to excavators. We also invite comment on who the best keeper of this information would be and whether any legislative or rule changes should be made to formalize or authorize this service.

### **3. Should the amount of time required for notice prior to the excavation be reduced?**

Certain other New England states have a 2-day waiting period between the time an excavator calls the Dig Safe System and the time it is allowed to begin excavation. Operators must complete on site mark-outs of their facilities within the waiting period. Maine's law allows a 3-day waiting (and marking) period. The operators and locating entities were not in favor of reducing the waiting (marking) period, arguing

that it would not be cost effective. Excavators also stated that operators and locators have experienced difficulty meeting the 3-day deadline for marking their underground facilities. Operators commented that a 2-day marking period might be adequate in a geographically small state, such as Rhode Island, but is not likely to be sufficient in a geographically large state such as Maine.

As a general matter, excavators appear to have successfully integrated the 3-day waiting period into their planning horizon so that the requirement does not pose a hardship in most instances. Some commenters noted that Connecticut has a short notice option for circumstances where an excavator wishes to begin excavation on a shorter schedule than normal, but which are not emergency situations. However, they also remarked that damage incidents have risen substantially as a result of this change in Connecticut law.

It is apparent that even a 2-day waiting period would not resolve water well constructors' concerns given that a driller often drills as many as three wells in a single day. Well drillers seek flexibility, advocating complete freedom from the Dig Safe law's notification procedures to allow them to respond to frequent requests by neighbors near a well drilling job site who request that the well driller also dig a well on their nearby property. Doing multiple jobs while in an area is more efficient than returning to the location at a later time. Because well drillers seek to be free of any delay occasioned by the Dig Safe law's notification procedures, we do not expect that reducing the waiting period from three to two days would resolve their concerns.

We heard little to persuade us that a reduced waiting period would be a beneficial change to the current Dig Safe law. There does not seem to be much support in the larger damage prevention community for making this change, which could adversely affect safety and increase the cost of complying with the law. It also does not appear that a reduction in waiting time to 2-days would resolve water well drillers' concerns. Therefore, we propose no change to the notice time. We invite further comment on this preliminary conclusion.

**4. Are there other notice requirements associated with drinking water well construction that the commission determines appropriate to adopt by rule?**

We have found no other changes to the Dig Safe law's notice requirements that would both maintain the safety standards of the law and resolve water well constructors' grievances with its requirements. However, we invite comment and specific suggestions on this issue.

**IV. PROCEDURES FOR THIS RULEMAKING**

This rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. A public hearing is scheduled on **November 6, 2003** in the Commission's Hearing Room at 242 State Street, Augusta, Maine. Written comments



on the proposed amended rule may be filed no later than **December 3, 2003** with the Administrative Director, Public Utilities Commission, 18 State House Station, Augusta, Maine 04333-0018 (telephone: (207)287-3831). Please refer to the Docket Number of this proceeding, Docket No. 2003-671, when submitting comments

In accordance with 5 M.R.S.A. § 8057-A (1), the fiscal impact of the proposed rule is expected to be minimal. The Commission invites all interested persons to comment on the fiscal impact of this rule as well as the significance of this issue to this rulemaking given that it, in substantial part, simply brings our rule into compliance with recent legislative amendments to the damage prevention law.

The Administrative Director shall send copies of this Order and the attached Rule to:

1. All utilities operating in Maine, including natural gas pipeline utilities;
2. Sewer and cable TV operators to the greatest extent practicable;
3. Excavators operating in Maine, to the greatest extent practicable;
4. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and
5. Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0015 (20 copies).

Accordingly, it is

O R D E R E D

1. That the Administrative Director send copies of this Notice of Rulemaking and attached proposed Rule to all persons listed above.

Dated at Augusta, Maine, this 7th day of October, 2003.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Diamond  
   Reishus